

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JOHN SUNDAY d/b/a SUNDAY
DRYWALL, and RICHARD WOOD,
WINDERMERE REAL ESTATE/NORTH,
INC.,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB Nos. 90-157
and 90-162

REVISED FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER ON RECONSIDERATION

John Sunday, Sunday Construction, and Richard Wood designated broker, Windermere Real Estate/North, Inc. ("Windermere") filed appeals contesting the Puget Sound Air Pollution Control Agency's (PSAPCA) issuance of Notice and Order of Civil Penalty No. 7246, (\$1,000) for alleged asbestos violations on or about July 13, 1990 at 3319 Shore Avenue in Everett, Washington.

On February 21, 1991 the Pollution Control Hearings Board held a hearing in Lacey, Washington. Present for the Board were Members Judith Bendor, chair and presiding, Annette S. McGee, and Harold S. Zimmerman. All Members have reviewed the record. Appellant John Sunday represented himself. Appellant Windermere was represented by Attorney Phil Mattern. Respondent PSAPCA was represented by Attorney Keith D. McGoffin. The proceedings were reported by Robert H. Lewis,

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
ON RECONSIDERATION
PCHB Nos. 90-157 & 162

1 of Robert H. Lewis & Associates, 733 Market Street, Suite 307, Tacoma,
2 Washington.

3 Witnesses were sworn and exhibits entered. Argument was made.
4 From the testimony and arguments heard, and exhibits reviewed, on
5 March 22, 1991 the Board issued Findings of Fact, Conclusions of Law
6 and an Order, with Mr. Sunday and Windermere being held liable for the
7 alleged violations, and Mr. Sunday's penalty suspended.

8 Windermere filed a petition for reconsideration. PSAPCA filed a
9 response and Windermere filed a reply.

10 Having considered the foregoing, the Board now issues these:

11 REVISED FINDINGS OF FACT

12 I

13 Mr. Richard Wood is the designated, licensed real estate broker
14 for Windermere Real Estate/North, Inc. At all times relevant,
15 Windermere was located at 4211 200th Street SW, Suite 110 in Lynnwood,
16 Washington.

17 Ms. Parveen Zadeh is a licensed real estate agent, who sells real
18 estate for Windermere. Mr. Wood was and is her supervisor. Ms. Zadeh
19 cannot sell real estate in Washington State unless a licensed real
20 estate broker participates.

21 II

22 Mr. John Sunday is a self-employed contractor who operates a
23 small business called Sunday Construction or Sunday Drywall. He
24
25

1 advertised in the Nickel Shopper and Everett Herald as "Complete
2 Drywall Services, Hanging, Taping, Texturing, Carpentry & Painting."
3 He had recently returned to contracting after several years absence.
4 He is not a certified asbestos worker.

5 III

6 In 1990, Mr. John Dziubala purchased a single family residence at
7 3319 Shore Avenue, in Everett, Washington (Snohomish County). Prior
8 to the purchase, he had lived out of state.

9 The property was owned by William and Linda Marchand. They had
10 it listed through a Windermere office in Mukilteo. Different people
11 apparently own the Windermere Lynnwood and the Windermere Mukilteo
12 offices.

13 IV

14 Ms. Zadeh was aware of the property through the multiple
15 listing. She showed the property to Mr. Dziubala in May 1990. She
16 also provided him with the name of a loan officer. Dziubala made an
17 offer to purchase the property, but wanted the house tested for
18 asbestos.

19 Samples were taken, which Zadeh took to AM Test Laboratory. She
20 listed Windermere Real Estate as the client to receive the analysis
21 report, with her name at the Windermere address in Lynnwood as the
22 person to receive the report. The test results were faxed to her, and
23 she faxed them to Mr. Dziubala.

1 The test results (May 15, 1990) showed the material contained
2 five percent (5%) chrysotile asbestos. The test result further stated:

3
4 *Any sample containing greater than one percent is*
5 *considered asbestos containing material according to*
6 *regulations in the State of Washington.*

7 The sale price was re-negotiated and reduced five thousand
8 dollars (\$5,000). Ms. Zadeh prepared an addendum to the purchase
9 agreement which stated the existence of asbestos and the sale of the
10 property "as is." The addendum was signed on May 19 and 20, 1990.
11 The closing date was to be June 27, 1990 with the buyer to take
12 possession three days later. The final sale price was \$480,000.

13 Ms. Zadeh conceded that she did more work for Mr. Dziubala,
14 because he was not present in Washington.

15 V

16 Mr. Dziubala asked Ms. Zadeh for names of contractors to do work
17 on the house. She provided him with several names and telephone
18 numbers, including Mr. Sunday's. Dziubala asked her to contact Sunday
19 for him, which she did.

20 In order for Sunday to estimate the job, he needed to see the
21 house and take some measurements. The sellers were still living in
22 the house and would only allow entry by appointment, accompanied by
23 the real estate agent. Zadeh went to the house, unlocked it and let
24 Sunday in, remaining with him there until he concluded.

25 These events occurred prior to closing.

Zadeh talked to Sunday on the telephone several times, and asked him the cost of removing a "popcorn ceiling."

Ms. Zadeh never told Mr. Sunday that the ceiling contained asbestos. After observing the witnesses' demeanor and hearing the testimony, we find that she was aware that Sunday would be removing the ceiling.

VI

Mr. Sunday and Mr. Dziubala agreed that all the work on the house would be done for \$3,800. Sunday later discovered that the work should have been a \$10,00-\$15,000 job. Sunday removed the popcorn ceiling and did other work in the house.

Affordable Abatement, Inc., a licensed and bonded company, removed and disposed of the ceiling material. There is no evidence that Sunday had contact with them.

VII

As a result of Mr. Dziubala's contacts with the Washington State Department of Labor and Industries (L & I) on asbestos regulation, an inspection was done. On July 12, 1990, during Mr. Sunday's work at the residence, Ms. Grace Georgio, Industrial Hygienist with L & I, did an inspection. At this point Sunday had been working at the house for over a week. He was already "muddying" in the ceiling, and ceiling material was on the floor.

The inspector was concerned about the situation. She discussed

1 the problem with her supervisor, Bob Parker. L & I went to the
2 residence and took 3 samples. These were sent to a lab for testing.
3 Results showed the samples contained "a moderate conc.[entration of]
4 chrysotile asbestos."

5 Mr. Sunday did not have an asbestos certification or a certified
6 asbestos supervisor on the project. L & I cited him for violation of
7 WAC 296-65-017, 296-65-020, and 296-65-030.

8 VIII

9 L & I contacted PSAPCA. As a result, inspector Richard Grenier,
10 went to the site on July 17, 1990. The removal of the ceiling had
11 been completed, and everything was cleaned up at that time.

12 Based on the laboratory tests L & I provided and Ms. Giorgio's
13 report, PSAPCA issued a Notice and Order of Civil Penalty No. 7246 on
14 August 17, 1990 to John Dziubala, to John Sunday dba/Sunday Drywall
15 and to Richard Wood dba/Windemere Real Estate, assessing a \$1,000
16 fine. The Notice alleged several violations of Regulation I, Article
17 10 for failing to: file a notice of intention to remove or
18 encapsulate asbestos materials (10.03), have the work done by a
19 certified asbestos worker (10.04(b)(1)), adequately wet asbestos when
20 removing (10.04(b)(2)(ii)), keep it wet until collected for disposal
21 (10.04(b)(2)(iii)(A)), collect the asbestos for disposal at the end of
22 each working day (10.04(b)(2)(iii)(B)), contain it until transported
23 to a waste disposal site (10.04(b)(2)(iii)(C)), and treat all
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26

1 asbestos-containing waste material with water and after wetting, seal
2 in leak-tight containers, while wet (10.05(b)(1)(iii)).

3 IX

4 John Sunday, Sunday Construction filed an appeal with the
5 Pollution Control Hearings Board on August 29, 1990, which became PCHB
6 No. 90-157. Richard Wood, Windermere Real Estate/North, Inc. filed an
7 appeal on September 7, 1990. This became PCHB No. 90-162. John
8 Dzuibala did not appeal. The appeals were consolidated for hearing.

9 X

10 Richard Wood has been a licensed real estate broker since 1978.
11 As the broker, he reviewed the real estate closing papers in this
12 sale. At all times relevant he worked as the broker at Windermere
13 Real Estate/North, Inc., not Windermere Real Estate as was cited in the
14 Notice and Order of Penalty. He was the supervisor for Ms. Zadeh. He
15 did not personally communicate with Mr. Dzuibala or Mr. Sunday. Mr.
16 Wood became aware of the asbestos problem in July during contact
17 with L & I.

18 XI

19 It is uncontested that the work involved the removal of asbestos
20 and the procedures listed in Regulations 10.03, 10.04(b)(1), and
21 (2)(11), (iii)(A), (B) and (C), and 10.05(b)(1)(iii) were not followed.
22
23
24
25
26

1 XII

2 Any Conclusion of Law deemed to be a Finding of Fact is hereby
3 adopted as such.

4 From these Revised Findings of Fact, the Board makes these:

5 REVISED CONCLUSIONS OF LAW

6 I

7 The Pollution Control Hearings Board has jurisdiction over the
8 parties and the subject of these appeals. Chpts. 70.94 and 43.21B
9 RCW.

10 II

11 The Puget Sound Air Pollution Control Agency (PSAPCA) has the
12 authority to carry out a program of air pollution prevention and
13 control, including regulation of asbestos removal, in a geographical
14 area which includes Snohomish County. We take judicial notice of the
15 PSAPCA regulations.

16 III

17 PSAPCA Regulation 10.03(a) states in pertinent part:

18 It shall be unlawful for any person to cause or
19 allow the removal or encapsulation of asbestos
20 materials or to work on an asbestos project [...]
21 unless the owner or person conducting an asbestos
22 removal or encapsulation operation has filed with
23 the Control Officer written notice of intention to
24 remove or encapsulate asbestos. [emphasis added]

25 PSAPCA Regulation 10.04(b) states in pertinent part:

26 It shall be unlawful for any person to cause or
27 allow the removal or encapsulation of asbestos
material or to work on an asbestos project unless:

1 [. . .]

2 (2) The following procedures are employed:

3 [. . .]

4 (iii) Asbestos materials that have been removed or
5 stripped shall be:

6 (A) Adequately wetted to ensure that they
7 remain wet until they are collected for
8 disposal; and

9 (B) Collected for disposal at the end of
each working day; and

10 (C) Contained in a controlled area at all
times until transported to a waste disposal
site; and . . .

11 PSAPCA Regulation 10.05(b)(1)(iii) states in
pertinent part:

12 One of the following disposal methods shall be
13 used during the collection, processing, packaging,
14 transporting or deposition of any
asbestos-containing waste material:

15 (1) Treat all asbestos-containing waste
material with water as follows:

16 [. . .]

17 (iii) After wetting, seal all
asbestos-containing waste material in
18 leak-tight containers while wet; . . .

19 IV

20 Under the Washington Clean Air Act, at RCW 70.94.431, civil
21 penalties of \$1,000 per day can be assessed for each violation .

22 It is undisputed that Regulations 10.03, 10.04(b)(1), and
23 (2)(ii), (iii)(A), (B) and (C), and 10.05(b)(1)(iii) were violated.
24 The issue remains: who is legally liable?

Mr. Dzuibula, the purchaser, did not appeal the penalty so his liability is not at issue in this proceeding.

Mr. Sunday, the contractor, said he was ignorant of the law.

The Washington Clean Air Act, on which the asbestos regulations are based, is a strict liability statute. Ken Pearson Construction Inc. v. PSAPCA, PCHB 88-186. Intent to violate need not be shown, neither can duty be avoided by delegation. Id. Lack of knowledge is not a defense to liability. Northwest Composites v. PSAPCA, PCHB No. 88-172.

The goal of the statute and regulations is to require that asbestos removal be done in a specified manner, to prevent the potential release of this dangerous material into the environment. Inherent in that goal is the requirement that persons who cause or allow asbestos work to occur have to determine if the material is asbestos. Mr. Sunday, newly returned to contracting, did the acts alleged, and lack of knowledge is no defense. Northwest, supra. We conclude he violated all the provisions cited.

However, we find his situation merits suspending the penalty cited against him, in its entirety, provided there are no air pollution violations for three years. The purpose of civil penalties is to promote future compliance. From all of the evidence, including the witness' demeanor, we are convinced that he learned a lesson and suspension of the penalty is merited.

VI

In contrast Ms. Zadeh knew the ceiling contained asbestos. She took the following actions regarding the asbestos:

1. taking a sample of the ceiling material to a laboratory;
2. listing Windermere Real Estate in Lynwood as the laboratory's client and herself as the person to receive the results;
3. receiving the test results and sending them to the buyer;
4. modifying the sales agreement to recognize the existence of asbestos, selling the property "as is" for a lowered price;
5. obtaining names of contractors, including Mr. Sunday, for the buyer); and
6. opening the house for Sunday, providing him access.

The above events occurred prior to closing.

7. contacting Sunday several times about removing the ceiling.
8. failing to inform Sunday that the ceiling contained asbestos.

(See Findings of Fact above).

Asbestos is an extremely dangerous substance. Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-176. Ms. Zadeh created a substantial risk that unlawful removal of this hazardous substance would occur. See, King v. PSAPCA, PCHB No. 88-59. We conclude that she "allowed" the unlawful acts to occur, as that phrase is used in the air pollution regulations, Regulation I, Article 10.

VII

Appellant Richard Wood dba Windermere Real Estate/North, Inc. contends that he and his company are not liable for Ms. Zadeh's acts, because she acted beyond the scope of her agency.

We conclude that Mr. Wood is not personally liable. There was no evidence presented at the hearing on who owned the company.

VIII

We conclude the company "allowed" the conduct to occur as that phrase is used in the air pollution regulations, Regulation I, Article 10.

In a long line of cases, where there is a strict liability statute, we have held landowners responsible for work done by others on their property, Ken Pearson, supra. Contractors have also been held liable for the acts of sub-contractors. The reasoning in those cases is persuasive.

Ms. Zadeh would not have performed as a real estate agent without Windermere's licensed broker. The company's broker was her supervisor. The company itself can be said to have invited the unlawful conduct, creating the risk that the statute and regulations were designed to prevent. King, supra, and cases cited therein.

IX

Appellant Windemere contended at the hearing that the Notice and Order of Civil Penalty were defective, and cannot be sustained because PSAPCA had the wrong company name on the Notice.

There is no dispute that the company did receive the Notice and Order by certified mail at its address in Lynnwood and accepted service. The alleged defect did not prevent the company from being able to litigate the appeal before this Board.

We conclude that the Notice and Order of Civil Penalty have been amended to conform to the evidence. Civil Rule 15.

X

The purpose of fines is to encourage the parties and the general public to comply with the law. We conclude the fine as to Windermere Real Estate/North, Inc. should be affirmed in full. Because of the company's actions associated with the sale, unsafe asbestos removal occurred, thereby jeopardizing the public and Mr. Sunday. The company's real estate sales person was aware of the asbestos. There has been no argument presented for mitigation.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Revised Conclusions of Law, the Board enters the following:

ORDER

Appellant Windermere Real Estate/North, Inc.'s Motion to Reconsider is DENIED.

Notice and Order of Civil Penalty No. 7246 for \$1,000 as to John Sunday d/b/a Sunday Construction and Sunday Drywall, remains AFFIRMED with the penalty SUSPENDED provided that he has no air pollution violations for three years from the date of this Order.

Notice and Order of Civil Penalty No. 7246 for \$1,000 remains AFFIRMED in full as to Windermere Real Estate/North, Inc.

DONE this 8th day of May, 1991.

POLLUTION CONTROL HEARINGS BOARD

Annette S. McGee
ANNETTE S. MCGEE, Member

Judith A. Bendor
JUDITH A. BENDOR, Chair

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

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FINAL FINDINGS OF FACT,
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